Chapter 4: Solutions for Evidentiary Challenges

4

Solutions for Evidentiary Challenges

Introduction

A critical component of judging is managing the receipt of evidence. As a practical matter, judges find that they often end up asking evidentiary questions of the parties, establishing the foundational facts for evidence, explaining what is needed for evidence to be admitted, and asking questions designed to clarify the weight to be given to the evidence.

However, judges often feel torn. On the one hand, they feel compelled to make sure that they hear all that they need to hear to decide the case fairly, both in terms of the totality of the evidence and the information about that evidence that lets them decide what weight to give it. On the other hand, they fear putting their hand on one side of the scales of justice as well as being possibly inconsistent with the governing substantive and procedural rules of evidence. California case law is clear that judges may not dispense with the rules of evidence in cases involving self-represented litigants. *Bonnie P. v. Superior Court* (2005) 134 Cal.App.4th 1249, at 1255.

I. Admit Evidence Where Appropriate, Fair, and Consistent With the Law

In these cases, a judge has three core goals:

1. To hear as much as appropriately possible about the case to reach a just and reliable outcome;[25]

2. To do so in a way that is consistent with the law; and

3. To do so in a way that is fair and is seen by the public as fair and as the product of a fair process.

II. Admissibility and Weight

These goals require that the following take place:

1. As much evidence as possible should be heard, provided that evidence is appropriate;

2. Evidence is not appropriate, that is, should not be considered, if it is not reliable, in the sense that it should not be given any weight;[26]

3. Evidence may not also be appropriate, and therefore not considered, because of other policy goals.[27] Generally, receipt of such evidence notwithstanding its being subject to exclusion is less harmful than in circumstances in which

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[25] This chapter frequently refers to "appropriate" evidence rather than the technical term "admissible" evidence, since it is attempting to provide practical guidance that is consistent with technical requirements and, indeed, to show that commonsense approaches will lead to results that comply with those requirements. (In some cases, as discussed below, evidence may well not be technically "admissible" had there been formal objection, but is not inappropriate or harmful and can be considered without that objection.)

If judges focus on the appropriateness of evidence, they will find that they are not in violation of technical rules governing the overall admission and consideration of evidence. However, while it may be appropriate to consider evidence that in a different procedural context might be excludable, nothing in this benchguide recommends the admission of evidence that would be inadmissible in the procedural context under discussion.

[26] In the relatively rare case of a self-represented litigant trying a case before a jury, evidence should also be excluded if it is prejudicial, in the sense that it will do more harm than good to the fact-finding process, because the jury will be prejudiced by it. If the case is before a judge, the judge is assumed to be able to avoid such prejudice.

[27] California Evidence Code, division 9, *Evidence Affected or Excluded by Extrinsic Policies*, e.g., §§ 1100–1109 (character, habit, and custom); §§ 1115–1128 (mediation); § 1152 (remedial action); § 1153 (offer of compromise); § 1156 (certain hospital research); § 1160 (certain statements of sympathy.)

exclusion relates to reliability (although to admit it over objection would be directly inconsistent with the rules of evidence);[28]

4. The fact-finder needs to have enough information to be able to decide the reliability and weight of each bit of evidence;[29] and

5. The processes must be consistent with the rules of evidence and procedure.

Judges need to find a process that meets these goals and reflects the way we see the legal system as a whole. Creating a special set of rules for self-represented litigant cases would be counterproductive. In the end, public trust and confidence in the legal system depends on decisions in all kinds of cases being made on commonsense grounds that are understandable by laypeople.

III. The Formal General Rules of Evidence

At first glance, it might appear that for a judge to meet the fact-finding goals described above would be difficult, particularly given the complexity of the rules of evidence.

However, as a practical matter, as the detailed analysis below shows, the general rules for the taking of evidence make the task much easier and, in fact, render most of the specific and hypertechnical rules largely irrelevant in day-to-day practice.

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[28] Such evidence is subject to exclusion for policy rather than reliability reasons. Examples include the rules dealing with prior criminal convictions (Evid. Code, § 1101) and those with subsequent repairs (Evid. Code, § 1152). The failure to exclude such evidence means that the policy underlying the rule of exclusion is undercut, but the core truth-finding goal is not. If the rule is that such evidence is admitted without objection, that represents in part a conclusion that the harm is less great than if the evidence should be excluded regardless of objection. (If only one side has an attorney, there is a residual potential unfairness under this model, in that it allows a judge to permit into evidence in a self-represented litigant case evidence that would be excluded were competent counsel present, or if the self- represented litigant objected. This imbalance is generally not present if neither party has counsel.)

[29] When there are lawyers present, the process of challenge, impeachment, and argument gives the judge the information he or she needs to make this decision. When there are no lawyers, that information must come from a different process.

Moreover, to the extent that the technical rules do constrain judges in self-represented litigant cases, this constraint is usually very much in the direction of commonsense notions governing the weight to be given to the evidence.

A. Evidence Admitted Without Objection

If evidence offered by a self-represented litigant is not objected to, that evidence generally comes in for all purposes.[30] Given that most self-represented litigants do not object, at least in the formal terms that objections require, most evidence is admissible and may be given such weight as the judge deems appropriate. The exceptions to this rule of admission without objection tend not to be technical rules but to deal with individual instances of very limited and obvious areas of highly prejudicial evidence.

B. Much Evidence Is Self-Admitting

Many forms of narrative testimony contain the foundation for their own admissibility, even if objected to. Many hearsay narratives, for example, contain a description of the circumstances from which the judge can determine that they meet foundational requirements. Some statements are clearly from their own context or content against interest,[31] or of family history.[32] Others are statements of mental or physical state,[33] or are business records.[34]

Similarly, many documents when offered as part of a narrative will meet foundational requirements, even if challenged or deemed challenged.

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[30] Evid. Code, § 353 ("A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion"); *People v. Alexander* (1963) 212 CA 2d 84, 98 (hearsay); *Powers v. Board of Public Works* (1932) 216 C 546, 552; Witkin, Cal. Evidence (4th ed., vol. 3), (2000) §§ 393, 394 and cases cited.

[31] Evid. Code, § 1230.

[32] Evid. Code, §§ 1310–1316.

[33] Evid. Code, §§ 1250–1253.

[34] Evid. Code, §§ 1270–1272.

C. A Judge Can Make Material Objection

The fact that evidence is not objected to does not mean that the judge has to admit it.

The judge is free to choose to act as if an objection had been made.[35]

D. Foundational Weight and Admissibility of Evidence

The judge can find out all that needs to be found out both in terms of the formal admissibility of the evidence and the weight to be given that evidence if admitted.[30]

There is nothing nonneutral, or any prohibition in the rules, in the judge's determining whether evidence offered is admissible, or in the judge exploring what weight to give it.

E. Weight and Credibility Are for the Fact-Finder

Unless clearly barred, most evidence is admissible in these circumstances.[36] Moreover, weight and credibility are for the fact-finder, which in self-represented litigant cases is usually the judge.

F. On Appeal, Judges Are Generally Assumed to Have Known and Correctly Followed the Law

In an appeal, the burden is on the appellant to show that the trial judge was in error, and the burden is on the losing party to make sure that the record shows that error.

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[35] Witkin, *supra*, § 393 (exclusion on judge's own motion of questions or underlying matter); *Davey v. Southern Pacific Co*. (1897) 116 CA 325, 330, 48 P 117; *Kimic v. San Jose–Los Gatos Interurban Ry Co* (1909) 156 CA 379, 390.

[36] Evid. Code, § 350 ("No evidence is admissible except relevant evidence."); § 351 ("Except as otherwise provided by statute, all relevant evidence is admissible."); § 210 ("'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action"); *Jefferson's California Benchbook* (3rd ed., 1997) vol. 1, p. 298, § 21.16; *People v. Hill* (1992) 3 CA 4th 959, 987.

For example, if evidence is admissible only for a limited purpose, the judge will be assumed to know this, and to have followed the rule, even if there was a general objection to the evidence. In other words, a judge will not be found to be in error for failing to exclude such evidence, provided it can be admitted for some purpose.

IV. These Principles Give Judges Great Discretion

Generally, it is totally proper for judges to find out all they need to about the evidence that is offered, to then admit it or not admit it, and to give it the weight they feel it deserves.

Conclusion

The rules of evidence therefore provide no barrier to judges using their discretion to obtaining, considering, and giving appropriate weight to the evidence they need to hear to decide cases fairly and completely.

Chapter 6 and the appendix to this benchguide provide examples of specific "scripts" that may help achieve these goals in particular situations.